Roofing, Metal & Heating Associates, Inc. *and* Michael Sullivan

Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity *and* Michael Sullivan

Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO *and* Michael Sullivan. Cases 4–CA–17133, 4–CA–17139, 4–CB–5588, and 4–CB–5589

August 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 18, 1990, Administrative Law Judge Irwin Kaplan issued the attached decision. Respondent Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity and Respondent Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO filed exceptions and supporting briefs. The General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity, Philadelphia, Pennsylvania; the Respondent, Roofing, Metal & Heating Associates, Inc., Southhampton, Pennsylvania, their officers, agents, successors, and assigns, and the Respondent, Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

Bruce C. Conley, Esq., and *Peter G. Verrochi, Esq.*, for the General Counsel.

Kathleen M. Smith, Esq. (Blackburn, Michaelman & Tyndall, P.C.), of Philadelphia, Pennsylvania, for the Respondent Employer.

Bruce J. Kasten, Esq. (Duane, Morris & Heckscher), of Philadelphia, Pennsylvania, for the Respondent Fund.

Stephen C. Richman, Esq. (Markowitz & Richman), of Philadelphia, Pennsylvania, the Respondent Union.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. These consolidated cases were heard in Philadelphia, Pennsylvania, on November 27 and 28, 1989. The underlying charges in each of the consolidated cases were filed by Michael Sullivan (the Charging Party) on February 4, 1988. The aforenoted charges gave rise to an order consolidating cases, consolidated complaint and notice of hearing dated August 31, 1989, which document was amended in minor respects at the hearing.

In essence, it is alleged that on or about December 2, 1987, Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO (Respondent Local 30 or the Union), caused the Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity (Respondent Fund or Fund), and Roofing, Metal & Heating Associates, Inc. (Respondent RMHA or RMHA), respectively, to discharge Michael Sullivan, as a training instructor at separate schools run by the Fund and RHMA. It is alleged that the Respondent Local 30 took this action because Sullivan ''was about to run for the office of Business Manager of the Union'' thereby violating Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). Further, it is alleged that Respondent Fund and Respondent RHMA separately violated Section 8(a)(3) and (1) of the Act by discharging said Sullivan to accommodate Respondent Local 30.

Each of the Respondents filed answers (amended at the hearing), admitting, inter alia, certain commerce facts including the Board's jurisdiction over Respondent RMHA and the labor organization status of Local 30. The Respondents denied, inter alia, the Board's jurisdiction over the Fund and that it acted as agent for Local 30. Each Respondent also denied that it committed any of the alleged unfair labor practices.

Affirmatively, the several Respondents raised various defenses, some of which they all joined, and others which were taken by one or more but less than all the Respondents. In principal part, a composite of the various defenses turn on whether Sullivan, as a training instructor, is an employee of

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's decision, we rely on *Iron Workers Local 15*, 298 NLRB 445 (1990), enf. denied and remanded 929 F.2d 910 (2d Cir. 1991). We note that in rejecting the liability standard employed by the Board in that case, the court of appeals relied on the fact that liability was being imposed in a compliance proceeding, as opposed to the original unfair labor practice proceeding, and the parties found liable had never been charged. In the present case we are determining liability against charged parties in an unfair labor practice proceeding.

In agreeing that the Union violated Sec. 8(b)(1)(A) and (2) by seeking employee Sullivan's discharge, Member Devaney finds it unnecessary to rely on the judge's analysis of *Shenango, Inc.*, 237 NLRB 1355 (1978). Even assuming that *Shenango* privileges a union to seek an employee's discharge over issues of internal union politics and that Sullivan's positions fall within *Shenango's* purview, Member Devaney would accord greater weight to Sullivan's Sec. 7 interest in participating in union affairs than to the Union's interest in preventing him from running for business agent. Member Devaney notes that the Union proffered no support for Mangini's statement that Sullivan's candidacy would ''tear the union apart.'' Member Devaney would find that the interests invoked by this unsupported statement, without more, do not outweigh Sullivan's Sec. 7 rights. Compare *Longshoremen ILA Local 1294 (International Terminal)*, 298 NLRB 479 (1990). (Defeated candidate's use of personal invective against successful opponent in intraunion election gave rise to reasonable grounds to question his loyalty.)

the Fund and/or RMHA entitled to the protections accorded under the Act, and whether the consolidated complaint is barred by the doctrine of laches. The subordinate issues will be noted infra.

On the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. *The Fund*

The Roofing & Sheet Metal Contractors Association of Philadelphia & Vicinity (RSMCA or Contractors Association) is an organization composed of employer-members engaged in the commercial and industrial roofing industry, and, inter alia, represents its employer-members in negotiating and administering collective-bargaining agreements with the Union, the most recent of which was effective by its terms from May 1, 1989, through April 30, 1993. The parties stipulated, inter alia, that George H. DuRoss, Inc. (DuRoss) is a Pennsylvania corporation with business offices at 7921 Oxford Avenue, Philadelphia, Pennsylvania, and is engaged in the business of roofing installation, re-roofing, and roofing repair and since at least 1987 DeRoss has been an employer-member of RSMCA. Since 1987, DuRoss' gross volume of business has, annually, exceeded $500,000 and its roofing services directly outside the Commonwealth of Pennsylvania has, annually, exceeded $50,000. During the aforenoted time period, Frank P. Manfredonia has been president and owner of DuRoss and a trustee and the management cochairman of the trust fund noted and described below. (G.C. Exh. 10.)

Pursuant to Section 302(c)(5)(C)(6) of the Act, the RSMCA and the Union created a trust fund (Fund), as set forth in an Agreement and Declaration of Trust. (G.C. Exh. 4.) Under article XXXIII of their collective-bargaining agreements, the employer-members of the Contractors Association are required to make contributions to the Fund, which operates a school to provide apprentice training to individuals employed in the commercial and industrial roofing industry within the jurisdiction of the Union. The apprentice training is conducted at the Union's training facility in Westville, New Jersey. The Fund employs and pays apprentice instructors. (For reasons discussed infra, I find that the apprentice instructors are employees within the meaning of the Act and not independent contractors or managerial employees.)

The Board has long treated trust funds, which are established by unions and contractor-employers pursuant to collective-bargaining agreements, as employers within the meaning of the Act, and has consistently asserted jurisdiction. See, e.g., *Chain Service Restaurant Employees Local 11*, 132 NLRB 960, 961–963 (1961); *Garment Workers Health & Welfare Fund*, 146 NLRB 790, 791–793 (1964); *Joint Industry Board of the Electrical Industry & Pension Committee*, 238 NLRB 1398, 1405 (1978); *Welfare, Pension & Vacation Funds Local 2*, 256 NLRB 1145 fn. 1, 1156 (1981); *Iron Workers Local 15*, 278 NLRB 914 (1986).

Here, the Board's jurisdictional monetary standards, either on an inflow or outflow basis, direct or indirect, are clearly satisfied. Thus, in addition to the stipulations regarding the business operations of employer-member DeRoss set forth above, it is alleged, the Respondent Fund and Respondent Local 30 admit (Tr. 13–14), and I find, that during the past year the Fund received collective contributions in excess of $50,000 from employer-members of RSMCA and during the same period, the employer-members of RSMCA, received gross revenues in excess of $500,000 and collectively purchased and received materials and supplies valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. In these circumstances, and on the basis of the entire record, I find that the Fund is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See, e.g., *Welfare, Pension & Vacation Funds*, supra; *Chain Service Restaurant Employees Local 11*, supra.

B. *RMHA*

It is alleged and admitted that RMHA is, and has been at all times material, an organization composed of employer-members engaged in the residential roofing industry and, inter alia, represents its employer-members in negotiating and administering collective-bargaining agreements with the Union (Local 30B).[1] Since 1986, the offices of the RMHA has been in Southampton, Pennsylvania. The RMHA supports a training school in Westville, New Jersey, for certain of its members. During the past year, the employer-members of the RMHA, in connection with its aforenoted business operations, collectively had gross revenues in excess of $500,000 and during the same period, provided services valued in excess of $50,000 directly outside the Commonwealth of Pennsylvania.

It is alleged, the Respondents admit, and I find that the RMHA and its employer-members are and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is alleged, the Respondents admit, and I find, that Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO (the Union, Respondent Union, or Local 30) is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

1. Local 30 and the Fund

The RSMCA and Local 30 have been parties to successive collective-bargaining agreements, the last of which by its terms is effective from May 1, 1989, through April 30, 1993. The Union is subdivided into Local 30 and Local 30B. As noted previously (fn. 1), Local 30 represents employees employed by commercial or industrial contractor-members of the RSMCA; whereas, Local 30B represents employees employed by employer-members of RHMA who are engaged in the residential roofing industry. Michael Sullivan, the Charging Party, was employed as an apprentice instructor of employee-members of both Local 30 and Local 30B. (This sec-

[1] The Union's members involved in commercial roofing are in Local 30; the members performing residential roofing are in Local 30B.

tion deals principally with Local 30 and the RSMCA and a trust fund that they jointly established; the relationship between Sullivan and Local 30B, vis-a-vis the RHMA, will be treated separately infra.)

Back around 1980, the Union (Local 30), and the RSMCA, established by contract, the Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity (the Fund), as permitted under Section 302(c)(5) and (6) of the Act. The Fund was established, inter alia, to provide an apprenticeship program to teach the roofing and waterproofing trade to individuals within the Union's jurisdiction. Pursuant to article XXXIII of the collective-bargaining agreement, and to a Declaration of Trust referred to therein, employer-members of the RSMCA make regular contributions to the Fund to finance the apprenticeship program. (G.C. Exh. 2.)

The Fund Agreement and Declaration of Trust provide, inter alia, for a Board of Trustees or Joint Apprenticeship Committee (JAC) made up of an equal number of representatives designated by RSMCA and the Union ''who shall be in charge of supervising the activities and administration of the Apprentice Fund and apprentice program.'' (G.C. Exh. 4, art. 2, sec. 3.) The Fund has three trustees appointed by the RSMCA and three trustees appointed by the Union. The trustees' responsibilities and powers include the following:

> To establish the policy and rules to which the Apprentice Fund is to be operated and administered. The Trustees shall have the power to formulate and adopt policies, standards of apprenticeship, rules and regulations in order to attain and achieve the purpose of the Apprentice Fund. [G.C. Exh. 4, art. IV, sec. 1(a).]

In the exercise of its responsibilities, the Fund (Board of Trustees or JAC) formulated written rules entitled ''APPRENTICESHIP STANDARDS FOR ROOFERS'' (Apprentice Standards). (G.C. Exh. 3.) There, JAC noted that its general duties included the ''operation of an adequate apprenticeship program.'' To that end, its specific duties, inter alia, were as follows:

> (a) To regulate, supervise and control all matters relating to apprenticeship of the roofing trade and be the sole agency within the jurisdiction of the Union and the Association [RSMCA] governing apprenticeship matters.
>
> . . . .
>
> (d) To establish the minimum standards of education and experience required of apprentices.
>
> (e) To determine the quality and quantity of experience on the job which the apprentice must have to be reasonably responsible for his obtaining it.
>
> . . . .
>
> (m) To recommend that each apprentice be issued a certificate of completion by the Pennsylvania State Apprenticeship Council after successfully completing apprenticeship and passing such examination as required by committee. [Id. at art. III, sec. 1.]

In addition to on-the-job training, the Apprentice Standards require a minimum of 300 hours or classroom or school instruction. (Id., art. V, sec. 3 (a).) While reference is made to the apprentice instructor, the document does not spell out the instructor's power. It does note that this apprentice instruction ''shall be under the direction of the committee [JAC].'' (Id. at. (c).) (The relative functions of JAC and the apprentice instructor will be treated more fully below.)

In or around February 1980, Richard Bozzi, was hired as the first apprentice instructor. Initially, the apprenticeship training was conducted at the RSMCA'S facility in Philadelphia, but in 1985, the school moved to a Union facility in Westville, New Jersey, its present location. At around the same time, the Fund decided to hire a second apprentice instructor. In or around August 1985, Steve Traitz, then business manager of the Union (the highest union position) and trustee and co-chairman of the Fund, telephoned Charging Party Michael Sullivan regarding that second position and the latter expressed immediate interest. In October 1985, Sullivan was hired to work with Bozzi, as a second apprentice instructor. Richard Harvey, the director of roofing services for the RSMCA and the administrator or recording secretary of the Fund, had Sullivan complete the necessary paperwork including the W-2 forms. (Tr. 41–42; G.C. Exh. 5.) The Fund deducted union dues, made pension fund contributions, and paid Sullivan and Bozzi the full journeyman's wages and fringe benefits. (Tr. 49.) Sullivan was paid on the basis of a 40-hour week.

Sullivan had been a journeyman roofer since 1971. As testified by Sullivan, [2] as instructor, ''I would handle classroom instruction, theory as well as hands-on application (simulated roofing) which we did on the floor of the mock-up room. Some record-keeping and some general maintenance in the training facility.'' (Tr. 75.) In addition to class room instruction, the apprenticeship program included on-the-job training. When the apprentices entered the program, for the most part, they were already working for contractor-members of the RSMCA and Sullivan did not play any role in the selection process. While Sullivan participated with representatives of the RSMCA (usually Harvey), and the Union at semiannual apprentice-evaluation sessions, Sullivan's role appears to have been largely ministerial and there is no evidence that he actually caused an apprentice to be dismissed from the program. Thus, Sullivan testified that he would present attendance reports and if they reflected three unexcused absenses, that apprentice would be terminated from the program. (Tr. 80–81.) Even as to these attendance shortcomings, Sullivan was not certain whether he recommended that anyone be terminated and there is no record evidence showing that he had actually done so. (Tr. 81.)

Basically, the semiannual evaluations were to determine whether the apprentice should be advanced to the next phase of the program. The apprentices were required to maintain daily and monthly reports reflecting their experience in some 15 to 20 job categories. These reports were evaluated by Fund officials with input from the apprentice instructor. If it was determined, at these semiannual sessions, that an apprentice was lacking experience regarding some aspect of his training, a letter would go out over Harvey's signature notifying the contractor to rotate the apprentice to alleviate that deficiency. The instructor would continue to monitor those reports over the following months and if little was done to broaden the apprentice's training or to correct shortcomings,

[2] Sullivan's testimony was largely corroberated or uncontradicted. He was responsive with no apparent effort to embellish his testimony. In short, I was impressed with Sullivan's demeanor and credit his testimony in all material respects.

the instructor would so inform Harvey or the Union for the Fund to take further action.[3] (Tr. 133–137.)

Sullivan, as instructor, spent almost all of his time at the training facility. On occasion, approximately four Saturdays a year, Sullivan would assist the apprentices in the field on charity jobs. On such occasions, a trustee would contact and instruct Sullivan to take some apprentices to a designated charity location to install a roof. Sullivan testified that the apprentices worked as volunteers and that he ''tr[ied] to rotate it so each apprentice got an equal share of it.'' (Tr.146–147.)

The apprenticeship program (for Local 30 members, covers 4 years, 32 weeks a year, one night a week per class. Sullivan testified that he was not involved in any of these decisions and when he started as instructor, the curriculum had already been in place. The usual incoming class comprised from 20 to 30 apprentices. There is no classroom instruction during the summer months. Sullivan was paid, as an apprentice instructor, on the basis of 52 weeks a year. During the summer period, Sullivan continued to work at the school, preparing classes for the fall, preparing manuals, xeroxing material, and performing some maintenance.

2. RMHA

As noted above, the RMHA is an association of roofing contractors in the residential Roofing industry. Unlike the RSMCA, whose members are in the commercial or industrial roofing industry, the RMHA's training program had not been expressly conducted pursuant to any collective-bargaining agreement. (At the time of the instant hearing, the RMHA training program was inoperative.) Rather, the program was instituted unilaterally by the RHMA without the assistance of its bargaining counterpart, Local 30B. While the RMHA-Local 30B collective-bargaining agreement sets up an ''Industry Fund,'' the provision indicates that it is essentially to defray expenses of the association and is silent in terms of supporting any apprenticeship program. (G.C. Exh. 7, art. XXII, pp. 34–36) Pursuant to that provision, employer-members now contribute 10 cents per hour for each hour of work (up from .06—id. at p. 34, art. XXIII), to meet the various expenses of the RMHA.

The RMHA training program commenced 1n 1977 or 1988 to upgrade the quality of work of employees working for employer-members of the association. During the early years of the training program, the fund incurred few expenses. As testified by Joseph Spitzer, executive secretary and chief officer of the RMHA, ''Basically, our only expenses were coffee and doughnuts at the end of the evening and some small expenditures for training material.'' (Tr. 207.) The program was essentially voluntary and the contractors or officers and directors contributed their services. The RMHA had free use of the Union's facility known as McCullough Hall to conduct the program. The program was known as Roofers Advanced Training School (RATS).

Joseph Karis, president and a director of the RMHA, played a major role in instituting the program. He was, inter alia, the principal instructor and solicited the services of other contractors to assist in the training. During the early years, the Union did not play any role in the program. In or around 1983, the RATS program was moved to the RSMCA school facility where Bozzi was the apprentice instructor. For an unspecified number of months, the RATS program continued to function much as it had when it was conducted at McCullough Hall without assistance from the Union. Karis continued to be the principal instructor for that program and since classes were at the same facility as the Fund's school, this gave him the opportunity to observe the competence and teaching skills of Bozzi. After about a year, Bozzi was retained as the instructor for the RATS program.

The record is far from clear as to the circumstances regarding the Union's involvement in that program, as well as Bozzi's hiring. According to Karis, the Union hired Bozzi for the RATS program and the RHMA basically acquiesced in that decision.[4] Bozzi was of the view that the decision to hire him resulted from discussions between then Union Business Manager Jack Kinkade and Karis.[5] Previously, the RMHA conducted a 6-month training program which under Bozzi's stewardship was extended to 2 years. Bozzi, was paid by RMHA, a flat rate which reached $150 for each class. The RHMA did not deduct taxes or make other deductions (unlike the RSMCA). He conducted one class, one night a week for local 30B-RHMA and three classes, three nights a week for apprentices within the jurisdiction of Local 30 (JAC or the Fund).

In September or October 1986, Bozzi, who was then contemplating dropping the Local 30B-RHMA job, asked Sullivan about his interest in taking over that class to which the latter was most receptive. Bozzi recommended Sullivan to Michael Mangini, then acting business manager (Traitz was under house arrest) and Robert Crosley, then a union executive board member and trustee of the Fund, to replace him as instructor of the RHMA program and they indicated their approval. (TR. 86–87.) Around December 1986, Michael Donnelly and Paul Rys, both officers of the RHMA, and active supporters of the training program, told Sullivan what they hoped to have covered in class. In January 1987, Sullivan replaced Bozzi for that program and that month he presided over his first Local 30B-RHMA class. Bozzi and Sullivan continued their instructional work for the Fund. At that time both schools were conducted at the Union's facility in Westville, New Jersey.

Donnelly and Rys attended virtually every Local 30B class taught by Sullivan. According to Sullivan, Donnelly, and Rys monitored what he was doing and would make recommendations which he would follow. While basically, the curriculum for Locals 30 and 30B were similar, Local 30B roofers were also trained on slate, tile, and shingles, areas in which Sulli-

[3] The reports were filled out and signed by the apprentice and countersigned by the foreman for the employer for whom the apprentice worked. The apprentice was charged with the responsibility of dropping the report off at class on the first of each month. Sullivan would review and transcribe the information onto a master copy. These reports related to work experience and not to other difficulties on the job. (Tr. 145.)

[4] Karis at times was unresponsive, equivocal, uncertain and vague, particularly with regard to the circumstances of Bozzi's hiring. For example, Karis testified that there came a time when the Union conveyed its interest in the school and ''before I knew it there was an instructor assigned by the Union to now run Local 30-B trainee program.''(Tr. 341.) When Karis was pressed further to supply more details, he could recall virtually nothing of what transpired on this subject. (Tr. 3432-344.) On the basis of demeanor factors and his overall testimony, I found Karis an unreliable witness.

[5] Bozzi's appeared somewhat as a reluctant witness. Thus, at one point, he acknowledged that his ''mind has played some tricks'' and that ''things are vague.'' (Tr. 245.) Thus, on balance, I find his testimony of little probative value.

van was not skilled. Thus, Sullivan needed assistance from Donnelly, Rys, occasionally Karis and other residential roofing contractors. After each class, Sullivan, inter alia, would go over the material covered that evening with Donnelly and Rys, discuss the strengths and weaknesses of the trainees, and check with those RMHA officials whether supplies were needed which were paid for by the RMHA.

It is undisputed that Sullivan performed his duties to the full satisfaction of the RMHA. Similarly, JAC had no complaints regarding Sullivan's performance as apprentice instructor of the Fund's program. Yet, he was dismissed as instructor of both programs. As noted previously, it is alleged that this action was taken because Sullivan indicated his intentions to run for the office of union business agent. Both the Fund and RHMA denied that it was involved in the hiring or firing of Sullivan and attributed decisions solely to the Union. The Union contended, inter alia, that any action taken by union officials were in their capacity as trustees of JAC and not as agents on behalf of the Union. Sullivan's alleged protected concerted activity and the circumstances of his discharge are treated below.

3. Sullivan's decision to run for union office and the loss of his position as instructor

In November 1987, a number of union officials, including Business Manager Stephen Traitz, Assistant Business Manager Michael Mangini, and Robert Crosley, a union executive board member and a trustee of the Fund, were convicted of criminal charges and forced to resign their positions with the Union. At the time of his conviction, Mangini had already effectively taken the place of Traitz (who had been under house arrest), as head of the Union and became acting business manager and co-chairman of JAC. On November 30, 1987,[6] Sullivan decided to run for business manager. That same day, Sullivan stopped in at the Fund's office and informed Harvey of his decision to run for that union position. The following day, Tuesday, December 1,[7] Sullivan called Mangini (then still acting business manager and co-chairman of the Fund), to advise him of that decision. According to Sullivan, Mangini told him the he would lose the election and the that the victor would be displeased with him (Sullivan) for opposing him in the election. (Tr. 102.) (Mangini was still serving his conviction at the time of trial and did not testify.)

Approximately one-half hour after Sullivan informed Mangini that he had decided to run for business manager, the former received a telephone call from Joseph Kinkade, a business agent for Local 30 and Local 30B to set up a meeting to discuss Sullivan's decision to run for office. They met in the parking lot at the Westville facility later that day. Sullivan remained in his car along with Bozzi. Kinkade came up to Sullivan and told him that it would be better for the Union if he withdrew from the race. Sullivan made it clear that he would not withdraw. Kinkade spent some 5 to 10 minutes attempting to dissuade Sullivan from running and finally walked away. That evening, at the RHMA class, Sullivan also told Donnelly and Rys of his decision to run for business agent and they wished him good luck and added that they hope he knew what he was doing.

Harvey testified that shortly before lunch on December 2, Mangini called him and told him that Sullivan and Bozzi were through as instructors and to prepare their pay checks. Assertedly, Harvey responded that he did not have such authority and that he would have to consult with the other employer-trustees. Mangini told Harvey to get back to him before the end of the day. Later that day, Harvey called Mangini and informed him that while the employer-trustees did not take any position, they had no grounds to oppose the decision and would proceed with processing the terminations. (Tr. 46.) That same day, Harvey also called Sullivan, at home, and notified him that he and Bozzi were terminated. (Tr. 109.) Bozzi testified that Mangini called him at home and informed him that he and Sullivan were terminated, as instructors, and that he (Bozzi), had to return the JAC car which the latter had been allowed to use. According to Bozzi, Mangini told him that he was taking this action because Bozzi was supporting Sullivan's campaign for union office. (Tr. 247–248.) Within a few days, Sullivan and Bozzi received 2 weeks' severance pay. The checks were cosigned by Harvey and Mangini. (Tr. 47.)

At around the same time, Sullivan also lost his job, as instructor, for the RMHA-Local 30B school. Rys testified that he had called the Union on another matter and learned from Kinkade that Sullivan would no longer be the instructor because he joined an opposing slate of candidates in the upcoming Union election. Rys, in turn, informed RHMA Executive Secretary Joseph Spitzer.

The evening of December 2, Sullivan was nominated to run for Business Manager as well as his entire slate of nine officers and executive board members to run against Joseph Crosley and the entire ''Crosley slate.'' (Joseph Crosley is the brother of Robert Crosley, a former business agent who was one of the thirteen union officials convicted in November.) The election was held on December 21 with the entire Crosley slate victorious. By letter dated January 21, 1988, Spitzer wrote to newly elected Local 30-Business Manager Joseph Crosley pointing out, inter alia, that Sullivan was a ''highly competent, dedicated instructor,'' and as such, urged Crosley, ''to reconsider Sullivan's firing and [to] restore him to his former status.'' (G.C. Exh. 8) This was not done. Michael Donnarumma was hired to replace Sullivan, as the instructor, at both the Local 30-Fund school, as well as at the Local 30-B RMHA school.

B. *Discussion and Conclusions*

The essence of the General Counsel's case is that Sullivan, as an apprentice and training instructor, was an employee within the meaning of the Act, entitled to the protections thereunder and, that he was unlawfully terminated for running for union office. The Respondents raise a number of threshold issues, any of which, if sustained, would necessarily preclude findings of unfair labor practices. Thus, the Respondents variously raise the equitable defense of laches; that Sullivan was a managerial or confidential employee or an independent contractor thereby excluding him from coverage under the Act; and, that Sullivan, as instructor, enjoyed a union appointive position. In this latter regard, the Respondents contend that manifestations of disloyalty such as running for union office against the wishes of the then cur-

[6] All dates refer to 1987, unless otherwise indicated.

[7] Sullivan erroneously noted that he met with Harvey on ''Tuesday, December 2nd''; whereas, that Tuesday was the first day of the month.

rent union officers is not protected activity. These threshold issues will be addressed first.

1. Laches

The underlying unfair labor practices charges (ULP's) in the instant case were filed on February 4, 1988. Those charges led to a consolidated complaint which issued on August 31, 1989, or approximately 19 months later. Counsel for the Respondent Union argues that ''the result was an inordinate delay before the issuance of the Complaint and a resulting prejudice to the position of the Union in these proceedings.'' (R. U. br. at 11.) Respondent Fund joined in the laches defense.

At the instant hearing, counsel for the General Counsel represented that there were several outstanding contempt orders against the Respondent Union and that the Regional Director withheld further formal action on the instant charges involving Sullivan's discharge, to consider whether said charges fell within the scope of those contempt orders. Accordingly, the matter was referred to the Contempt Litigation Branch of the General Counsel and a decision was subsequently made to proceed with the instant case independently of the contempt litigation. (Tr. 26.) Counsel for the Respondent Union noted that he had not been previously informed that the instant Sullivan matter was considered as a possible contempt case, a fact acknowledged by counsel for the General Counsel. (Tr. 27.)

The elements of proof required by the equitable defense of laches are ''(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'' *Costello v. U.S.*, 365 U.S. 265, 282 (1961). However, it has long been observed that the defense of laches does not lie against the Board, as as agency of the United States Government. *NLRB V. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *Consolidated Casinos Corp.*, 266 NLRB 938, 992 (1983); *Merrell M. Williams*, 265 NLRB 506, 508 (1982); and *Aircraft Upholstering Co.*, 228 NLRB 462 (1977). Counsel for Respondent Fund's reliance on *Northern Stevedoring & Handling Corp.*, 143 NLRB 8 (1963), is clearly misplaced and factually distinguishable. While there, the Board noted, inter alia, the length of time which had elapsed since the filing of charges and the issuance of the complaint, it also noted that the disputed contractual provisions were no longer in effect and that the General Counsel did not oppose dismissal of the complaint. In any event, I find for reasons noted below, that the record falls far short of establishing the elements noted in Costello that are critical to sustain a laches defense.

According to counsel for the Respondent Union, after the filing of the instant ULP's, Mangini, who was acting business manager of the Union as well as co-chairman of the JAC and who was alleged to be principally responsible for Sullivan's termination, ''was incarcerated and was not available to the Local Union to prepare its defense to these charges.'' While Mangini was convicted of a number of crimes in December 1987, there is no showing on this record that he was incarcerated at any time prior to May 1989, or, approximately 13 months after the instant charges were filed. In this regard, the record disclosed that Mangini was ordered to report May 5, 1989 to the ''designated institution'' to serve his sentence. (U. Exh. 1.) Thus, I fail to discern how the Respondents suffered prejudice, particularly in the absence of any showing that Mangini was in fact inaccessible over a 13-month period. As for the General Counsel's failure to inform Respondents that it was contemplating linkage of the instant case to outstanding contempt orders, I find, without more, that this should not have caused the Respondents to change any position to its detriment. Surely such consideration by the General Counsel, along with any concomitant delay is not tantamount to misleading any of the Respondents that the General Counsel was no longer interested in actively pursuing the instant charges.

In rejecting the notion that the Respondents suffered prejudice by the delay in the issuance of the complaint, I also note that there is a dearth of evidence tending to show what efforts were made, if any, to attain Mangini's cooperation or to secure his release or the cooperation or release of other former convicted union officers for the limited purpose of providing evidence or testifying in this proceeding.[8] Nor have any of the Respondents made an offer of proof, to the effect, that had any of these potential witnesses testified, that they would have have materially rebutted the General Counsel's case. As will be noted below with regard to the substantive protected activity allegation, the weight of the evidence is impressive and patently clear that Mangini played a major role in the decision to terminate Sullivan because he decided to run for union office.

In view of the foregoing and on the entire state of this record, I find that the Respondents' efforts showing prejudice are, at best, obscure and fall short of justifying invoking the doctrine of laches as a defense either factually or as a matter of law. Accordingly, the defense of laches is rejected.

2. Whether Sullivan was a managerial or confidential employee

The Fund

It is well settled that managerial employees are exempted from coverage under the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1947); *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). In *Bell*, the Court observed with approval the Board's exclusion of ''managerial employees'' defined as those who ''formulate and effectuate management policies by making operative the decisions of their employer.'' Supra at 288. In *Yeshiva*, the Court held that managerial employees ''must exercise discretion within, or even independently of established employer policy and must be aligned with management.'' Supra at 683. In the instant case, I find that the record failed to demonstrate that Sullivan possessed the authority to exercise the kind of discretion in any meaningful sense, independent of established management policy, to justify characterizing his instructor's position as managerial in nature. He clearly was not involved in formulating management policies. On the other hand, the record disclosed that Sullivan, as an instructor and union member, shared certain common interests with other unit employees which tend to militate against a managerial status finding.

The record disclosed that Sullivan had become a journeyman back in 1971 and since that time he has retained his

[8] Counsel for the Respondent Union merely represented that the attorneys of these convicted former officers ''would not allow us to discuss any of these matters with them.'' He did not proffer any documentation in support thereof nor did he otherwise relate the steps he had taken, if any, to interview these potential witnesses. (Tr. 19.)

membership in Local 30. Since becoming an instructor in October 1985, Sullivan had received the full journeyman's wages and fringe package that unit employees received under the associationwide Local 30 contracts. Thus, the Fund made deductions and contributions for the health, welfare, and pension funds; the prepaid legal fund; and the vacation fund. The Fund also deducted union dues from Sullivan's wages.

With regard to the discretion Sullivan possessed as an apprentice instructor, the credited testimony revealed that it was minimal, covering minor expenditures, such as the occasional purchase of paper for certain routine clerical functions for which he would be reimbursed. As noted above, Sullivan did not exercise discretion independent of JAC's written (the fund agreement and declaration of trust) or established policies. See *Milwaukee Children's Hospital Assn*., 255 NLRB 1009, 1013–1014 (1981). He had no authority to select any of the candidates for the school nor could he dismiss any one from the program. His input to the JAC regarding the dismissal of apprentices related almost entirely to poor attendance as reflected in monthly attendance reports in violation of the Fund's rules. Thus, three unexcused absences required dismissal. (Tr. 80–81.)

While Sullivan attended the semiannual evaluation sessions, these meetings were conducted largely to review and ensure that apprentices received training in all phases of roofers' work. In this regard, if it were determined that an apprentice was deficient in a particular area, a form letter over Harvey's signature would be sent to the contractor requesting that the apprentice be rotated to gain more experience in that phase of the roofers work found to be deficient. (Tr. 135–136.) These work reports were signed by both the apprentice and the foreman on the job and submitted to the instructor. The instructor would transcribe the data on to a master card which disclosed the apprentice's experience. Sullivan did not as a rule visit the jobsites[9] and could not transfer an apprentice from one job to another.

Sullivan's job was mainly to provide classroom instruction, theory as well as hands-on application (simulated roofing), at the training facility. When he was hired, a curriculum was already in place. He did not attend Fund or trustee meetings other than for the limited purpose of the semiannual review and evaluation of apprentices, as noted above. Clearly, finding a technical or industrial instructor, as here, in a nonacademic setting, to be an employee within the meaning of the Act, is not without precedent. See, e.g., *Iron Workers Local 15*, 278 NLRB 914 (1986); *National Cash Register Co*., 95 NLRB 27, 32 (1951); *New England Telephone & Telegraph Co*., 100 NLRB 643, 645 (1952); *Heintz Mfg. Co*., 100 NLRB 1521, 1526 (1952). On the basis of the entire record, noting particularly, that Sullivan spent the great bulk of his time as an instructor with virtually no power or authority to act autonomously in any meaningful sense or deviate from the Fund's or the JAC's established policies, I reject the contention that Sullivan, as an apprentice instructor, was so aligned with management to justify denying him rights guaranteed employees under the Act. Accordingly, I find that Sullivan was not a managerial employee.

[9] The only apparent exception is with regard to charity work when the instructor assisted apprentices in the field. On these occasions, the apprentices worked as volunteers and rotated so that the work was distributed equally. In all, this charity work amounted to approximately four Saturdays a year.

Turning to the Fund's contention that Sullivan should be denied the protections accorded by the Act on the basis that he functioned as a confidential employee, I find that this position is also unsupported by the record and is otherwise untenable.

First, it is noted that the Fund had neither raised this issue in its answer or at the hearing. In any event, it acknowledged that under Board law, citing *Peavey Co*., 249 NLRB 853 (1980), confidential employees are covered under the Act. (Fund's Br. at 21.) While the Fund urges that I apply certain decisions of U.S. courts of appeals which have taken contrary positions, I am bound to honor still viable Board law. See *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Speco Corp*., 298 NLRB 439 (1990). However, even on the merits, for reasons noted below, the record falls short of establishing that Sullivan was a confidential employee.

Thus, the record failed to disclose that Sullivan acted in a confidential capacity to persons in charge of the Fund's labor relations policies. In this connection, it is noted, inter alia, that none of the apprentices are directly employees of the Fund. Further, without more, I do not find that Sullivan was a confidential employee merely because he was involved in recordkeeping and attended semiannual evaluation meetings. Those records reflected essentially objective data and any recommendations by him in connection therewith were dictated by the policies of the Fund, i.e., three unexcused absences mean automatic dismissal from the program. See, e.g., *Milwaukee Children's Hospital Assn*., supra at 1013–1014; *Heintz Mfg. Co*., supra. Moreover, there was no showing that labor relations was discussed at these meetings. In short, I find that Sullivan was not a confidential employee.

3. Whether Sullivan was an independent contractor

RMHA

The RMHA denies that it exerted employer-like control over Sullivan sufficient to attach liability for his dismissal as instructor. In its brief, the RMHA made a ''right to control'' analysis without actually calling Sullivan an independent contractor to support its contention that Sullivan was not its employee. The record disclosed both, a number of factors tending to support and militate against this position.

The Board has long applied the common law, right-of-control test in determining whether an individual is an employee or independent contractor. *NLRB v. United Insurance Co*., 390 U.S. 254 (1968); *Prentiss & Carlisle Co*., 230 NLRB 373, 374 (1977); *Aetna Freight Lines*, 194 NLRB 740 fn. 2 (1971). An employer-employee relationship is found to exist, where the employer reserves the right to control not only as to the ends to be achieved but also as to the means to achieve such ends. See *Edward Blankstein Inc*., 245 NLRB 951, 955 (1979). It has long been observed that the application of this test is not a ''perfunctory exercise'' but demands a balancing of all the evidence relevant to the relationship. *Deaton, Inc*., 187 NLRB 780, 781 (1971); *Edward Blankstein Inc*., supra; see also *Big East Conference*, 282 NLRB 335, 342 (1986).

As noted above, the record revealed a number of factors tending to negate the employer-employee relationship, as contended by the RMHA. Clearly, the relationship between the RMHA and Sullivan and the Local 30B training school on one hand and on the other that of the RSMCA or the

Fund in dealing with Sullivan and the Local 30 apprentice school, was substantially different; the former program was far less structured. Thus, the Fund, unlike the RMHA, was established by a collective-bargaining agreement containing a declaration of trust which, inter alia, provided for a joint committee of employer and union trustees (JAC) to regulate, supervise, and control all matters related to the school and the apprenticeship program. The collective-bargaining agreement between the RMHA and Local 30B does not contain any provision for the establishment of an apprenticeship program and is otherwise silent on this subject.

The RMHA training program was instituted to upgrade the quality of work of employees employed by RHMA members. The program was largely informal and initially, the instructors were employer-members of the RMHA who volunteered their time and certain resources. From the program's inception in 1977 or 1978 to until sometime in 1983, the Union played no role. In or around 1983, Bozzi became the first paid instructor for the RHMA. While the circumstances are unclear regarding the Union's subsequent role, according to Karis, the Union hired Bozzi, and the RMHA merely acquiesced in that decision. In 1987, Sullivan replaced Bozzi as the instructor with the latter's recommendation and the blessing of the union's officers. Again, the record is unclear whether the RHMA played any role in the hiring of Sullivan but in any event it did not object and was familiar with his qualifications. Unlike the arrangements with the Fund, neither Bozzi nor Sullivan had deductions taken from their pay; instead, both were paid the same flat rate for each class of instruction. Nor did the RMHA provide fringe benefits or obtain insurance or bonding for its instructors. According to Respondent RMHA: '' Once the union became involved with the training program the role of the RMHA was limited solely to the issuance of payment to the instructors by the Union.'' (R. RMHA Br. at 4.)

While the factors relied on by the RMHA are not inconsequential and have some appeal, I find still other prominent factors which tend to support the employer-employee relationship and that its involvement with Sullivan and the training program, was significantly greater than merely providing a paycheck. For example, contrary to the RMHA, I find that a careful reading of the record disclosed that the RMHA did in fact oversee Sullivan's work. In this regard, Sullivan credibly testified that after the decision was made to hire him but before he had his first Local 30B class Donnelly and Rys (both directors and officers of the RMHA) told him what they expected him to cover in class. Donnelly and Rys also attended virtually every class and they met with Sullivan after each session to go over the work covered and to determine the agenda for the following week as well as deciding whether additional materials were needed. Sullivan did not possess the knowledge or broad range of skills in residential roofing that he had in commercial roofing and at times required help from Donnelly, Rys and other roofing contractors in instructing the class.

Another factor relied on by Respondent RMHA in denying the employer-employee relationship is that, assertedly, it was not involved in evaluating Sullivan's performance. While the RHMA may not have have evaluated Sullivan in a formal or conventional sense, it closely monitored his work and, in effect, was evaluating his performance indirectly day by day. Thus, it is noted, inter alia, that the RMHA was always pleased with Sullivan's performance as reflected in a letter to the Union to get Sullivan reinstated at the school. There, Executive Secretary Spitzer wrote, inter alia, ''Mr. Sullivan had been teaching our training class (emphasis added) for one year. . . . We have always found [him] to be a highly competent, dedicated instructor.'' (G.C. Exh. 8.) While it appears that the Union was principally (if not entirely) involved in the decision to hire and fire Sullivan it also appears that the RMHA elected to accommodate and to defer such decisions to the Union; that is not the same as saying that the RMHA was powerless to act otherwise.

The funds to pay for school materials, the instructor's salary, and the rent for the school facility were all provided by the RHMA out of the contractor-members contributions to the general industry fund. Thus, it is undisputed that the ''RMHA bore the cost of the program.'' (R. RMHA Br. at 8) The fact that the RMHA did not provide fringe benefits, take out taxes, or or make payroll deductions are not uncommon in employment relationships and is not controlling in deciding independent contractor status. *Herald Star*, 227 NLRB 505, 506–507 (1976); *Edward Blankstein Inc*., supra at 956. Moreover, Sullivan was already receiving all the fringe benefits from the Fund which unit members received under the RRMCA-Local 30 collective-bargaining agreement.

On balancing a plethora of factors, many of which are noted above and on assessing the total record, noting particularly the daily active involvement and control in the training program by RHMA directors and officers,[10] I reject the notion that Sullivan functioned as an independent contractor. Conversely, I find that the RMHA employed Sullivan as an employee within the meaning of the Act.

4. Whether Sullivan occupied a union appointive position

The Respondents asserted that Sullivan occupied a union appointive position and relying largely on *Shenango Inc*., 237 NLRB 1355 (1978), contend that even if he were discharged for political activity, such discharge was privileged and not violative of the Act.

First, I am unpersuaded and reject the notion that Sullivan, as instructor, possessed the responsibilities and functions, vis-a-vis the union, similar to those of the plant safety committee chairman in *Shenango* or, those of shop stewards or business agents in other cases where the Board and the courts have treated loyalty to the union as a legitimate consideration and permitted unions to terminate various staff members for dissident activities. Compare *Finnegan v. Leu*, 456 U.S. 431 (1982) (union business agents); *Rutledge v. Aluminum Workers*, 737 F.2d 965 (11th Cir. 1984) (director of union's regional office); *Longshoremen ILA Local 1294 (International Terminal)*, 298 NLRB 479 (1990) (safety man); *Teamsters Local 282 (General Contractors)*, 280 NLRB 733 (1986) (shop stewards).

Here, unlike the cases relied on by Respondents, Sullivan was without any authority to carry out any collective-bargaining responsibilities on behalf of the Union or its members in dealing with his employers. His job was to teach and train apprentices for the Fund and to improve the quality of work of employees of contractor-members of the RMHA.

[10] Also reflecting on the control over the training program by the RMHA is its unilateral decision to discontinue that program.

While Sullivan, on rare occasion, may have provided his classes with information about the Union, there is no showing that it was required or part of Sullivan's job; any ''pep talk'' or otherwise promoting the Union were provided by the union officers and not Sullivan. The latter barely touched on this subject and only incidentally. As Sullivan credibly testified, without contradiction: ''We may touch on it, if they [the students], would ask me a question on it. . . . I would answer them. But [only] once in a blue moon we would hit on that [subject].'' (Tr. 151.)

Nor do I find the fact that Sullivan, on approximately four Saturday's a year, provided assistance to apprentices on union sponsored charity projects in the circumstances of this case, significantly alters the nature of the instructor's position to that of a union official. In this regard it is noted that the charity program was voluntary and the apprentices on such jobs were rotated so that the work was distributed as equally, as possible. As for the decision to hire and discharge Sullivan, as noted previously, I find that the Fund and the RMHA elected to go along and to defer to the Union's wishes but not that they were powerless to take any other course of action. Of greater significance, is that Sullivan was employed by the Fund and the RMHA and was not a union employee. See, e.g., *Welfare & Pension Funds*, 251 NLRB 1241 (1980). Cf. *Retail Clerks Local 770*, 208 NLRB 356 (1974) (union employees were not protected for engaging in dissident activities).

Further, *Shenango* and related cases are misplaced for the additional reason that they involve removing a person from serving in a representative status on behalf of the union and unit employees in dealing with the employer and, not as here, dissolving a person's employment status. In sum, I find that factually Sullivan did not hold an appointive union position within the meaning of *Shenango* and its progeny. Accordingly, the Union was not privileged, under the Act to cause his discharge.

5. Whether Sullivan was discharged over his decision to run for union office

The record clearly disclosed that Michael Mangini was chiefly responsible for Sullivan's demise as instructor on December 2, 1987, at both the Fund and the RMHA schools. Mangini, at the time, served as acting business manager, and concomitantly, the de facto head of the Union.[11] It is undisputed that Mangini took this action because Sullivan announced that he would run for the vacant business manager's position in opposition to Mangini's preferred candidate. In this regard, Sullivan and co-instructor Bozzi testified credibly and without contradiction that Mangini admitted as much in phone conversations to them separately on December 2. Harvey testified that Mangini telephoned him on December 2 and instructed him to terminate the apprentice instructors and to prepare their termination checks (one day after Sullivan informed Mangini of his decision to run for union office).

As noted above, Mangini's role in Sullivan's discharge and the nexus to Sullivan's decision to run for union office is not challenged. However, the Respondent Union denies any responsibility for Mangini's actions which it asserts was taken solely in his capacity as co-chairman of JAC, a separate and distinct legal entity and not in his capacity as a union official. The record persuades me otherwise. While Mangini served as a Fund trustee, the record is completely devoid of any suggestion that he was displeased with Sullivan's performance as an instructor or employee of the Fund. On the contrary, Sullivan, as instructor, performed to the full satisfaction of the Fund as well as of the RMHA. Thus, there is no connection between Sullivan's performance as an employee and his dismissal. Why then did Mangini take this action? The answer is inescapable, and I find, that Mangini acted solely in the interest of the Union as he perceived it to be and clearly not in any trustee capacity. In support thereof, the record disclosed that when Sullivan informed Mangini, as the acting head of the Union of his decision to be a candidate, the latter responded by intimating certain unspecified reprisals. (Tr. 102.) Mangini clearly preferred the opposing slate of candidates advising Sullivan that ''we got a guy that can beat you and this guy is not going to like you too much when he gets in there.'' (Tr. 102.) He also cautioned Sullivan not to ''knock'' him during the campaign. (Tr. 138.)

In rejecting the Union's denial of responsibility for its role in causing the ouster of Sullivan, it is also noted that approximately one half-hour after Sullivan first informed Mangini of his decision, the former was contacted by Union Business Agent Joseph Kinkade who wanted to meet with him to discuss his candidacy. Later that same day, Kinkade unsuccessfully pressed Sullivan to withdraw his candidacy telling him that by running, he would be tearing the union apart. (Tr. 104.) Sullivan was terminated the next day. As indicated above, there is no pretense that the Union's action was taken for any reason other than Sullivan's decision to run for union office. Kinkade (business agent for Local 30 and 30B) also admitted as much by revealing to Paul Rys, vice president of the RMHA, that Sullivan was no longer the instructor because ''[he] is on the opposing slate'' in the upcoming election.[12] (Tr. 328.)

Having found that the Union caused Sullivan's termination, I turn now to consider the role of the Fund and the RMHA. Both Employers denied any responsibility for discharging Sullivan, attributing the action solely to the Union. In this connection, the record disclosed, and I find that neither Employer displayed the slightest animus toward Sullivan for his dissident activities. In fact, both the Fund and the RMHA were reluctant to go along; the RMHA, for its part (as noted previously) wrote to the Union asking it ''to reconsider [Sullivan's] firing and to restore him to his former status.'' (See fn. 12, supra.) Nonetheless, in the circumstances of this case, the fact that the Union had been delegated (at least impliedly) the principal role in hiring and firing the instructors, does not, by itself, relieve the Fund or RHMA of employer status or responsibility, particularly here, where each employer sufficiently controlled and paid for their respective programs, both knew of Sullivan's candidacy, and also knew that the Union's action flowed therefrom. See *Wolf Trap Foundation*, 287 NLRB 1040 (1988).

[11] Harvey, the administrator or recording-secretary of the Fund, testified that with the departure of Steve Traitz, ''Mangini became the figure at Local 30 with whom you spoke.'' (Tr. 62.)

[12] The RMHA perceived the Union to be responsible for Sullivan's ouster. Thus, Executive Secretary Joseph Spitzer wrote to the newly elected Union Business Manager Joseph Crosley urging him to reconsider and reinstate Sullivan. (G.C. Exh. 8.)

In view of the foregoing, and the entire record, I find that counsel for the General Counsel has demonstrated all the elements of a prima facia discriminatory discharge: protected activity, employer knowledge,[13] animus (supplied by the Respondent Union) and timing (one day after informing Respondents of the dissident activity) and further, that the Respondents had not come forward to demonstrate that Sullivan would have been discharged notwithstanding his protected activities. *Wright Line*, 251 NLRB 1083 (1980).

Accordingly, I find that the Union by causing the Fund and the RMHA to go along with its decision to terminate Sullivan as instructor violated Section 8(b)(1)(A) and (2) of the Act and, a fortiori, in the circumstances of this case, the Fund and the RMHA, by so accommodating the Union, violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Fund is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent RMHA and its employer-members are, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent Union, by attempting to cause and causing the Respondent Fund and Respondent RMHA to terminate Michael Sullivan as instructor, engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. The Respondent Fund violated Section 8(a)(3) and (1) of the Act by accommodating the Respondent Union, in discharging its employee, Michael Sullivan, because he had engaged in protected intraunion political activities.

6. The Respondent RMHA violated Section 8(a)(3) and (1) of the Act by accommodating the Respondent Union in discharging its employee, Michael Sullivan, because he had engaged in protected concerted activities.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent Union has engaged in certain unfair labor practices and concomitantly, that Respondent Fund and Respondent RMHA have engaged in certain other unfair labor practices, I shall recommend that Respondents be required to cease and desist therefrom and take certain action designed to effectuate the policies of the Act.

Having found that Respondent Union was responsible for causing Michael Sullivan to lose his position as instructor for Respondents' Fund and RMHA respectively, I shall recommend that it cease and desist therefrom and to notify Michael Sullivan, Respondent Fund, and Respondent RMHA, respectively and separately, in writing, that it has no objection to said Sullivan's reinstatement to his former position. See, e.g., *Q.V.L. Construction, Inc*., 260 NLRB 1096, 1097 (1982); *Operating Engineers Local 138*, 233 NLRB 267 272–273 (1978).

Further, having found that Respondent Fund and Respondent RMHA had unlawfully accommodated or deferred to the Respondent Union's unlawful action, I shall recommend that the Employer-Respondents offer Michael Sullivan immediate reinstatement to his former position, discharging if necessary any employee hired to replace him.[14] As I have found that the Respondent Union alone displayed animus and that it was principally responsible for Sullivan's termination (Respondent-employers, without any animus reluctantly, albeit wrongfully, merely acceded to the Respondent Union's instructions), I find that the Act will best be effectuated by holding the Respondent Union primarily liable for any loss of pay Sullivan sustained as a result of its unlawful action against him. See, e.g., *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1324 (1976). Accordingly, I recommend that the Respondent Union in conjunction with the Respondent Fund, on one hand, and the Respondent Union in conjunction with Respondent RMHA, on the other, with the Respondent Union primarily liable, shall be ordered to make Sullivan whole for any loss of earnings, with interest, resulting from Respondents' unlawful action.[15] Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

A. The Respondent, Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity (Respondent Fund), Philadelphia, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acceding to the demand of Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO (Respondent Union), to discharge Michael Sullivan or any other employee for exercising their rights to engage in intraunion political activities protected under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[13] Rys and Donnelly, RMHA union officers, also acknowledged that they believed that Sullivan was a candidate for union office before he was terminated. With regard to the Fund, the record disclosed, inter alia, that Sullivan told Harvey of his candidacy and warned him that he would be accountable if adverse action were taken against him.

[14] It appears that Respondent RMHA at some unspecified date discontinued ts training program. If in fact that occurred, the RMHA's liability would be tolled as of that date. However, as this matter was not documented or otherwise litigated, I recommend that any finding thereon be determined at the compliance stage.

[15] The Union's backpay liability shall terminate 5 days after it notifies Respondent Fund, Respondent RSMA and Sullivan that it has no objection to said Sullivan's reinstatement to his former instructor's position. See, e.g., *Q.V.L. Construction, Inc*., supra at 1097 fn. 9.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Michael Sullivan immediate and full reinstatement to his former position as apprentice instructor, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any person hired to replace him and, in conjunction with Respondent Union, with Respondent Union primarily liable, make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the section of this decision entitled ''The Remedy.''

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at the training facility in Westville, New Jersey, copies of the attached notice marked ''Appendix A.''[17] Copies of the notice, on forms provided by the Regional Director, for Region 4, after being signed by a representative of the Respondent Fund, shall be posted immediately upon receipt and maintained by the Respondent Fund for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Fund has taken to comply.

B. The Respondent, Roofing, Metal & Heating Associates, Inc. (Respondent RMHA), Southhampton, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acceding to the demand of Respondent Union to discharge Michael Sullivan or any other employee for exercising their rights to engage in intraunion political activities protected under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Sullivan immediate and full reinstatement to his former position as training instructor, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any person hired to replace him and, in conjunction with Respondent Union, with Respondent Union primarily liable, make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, in the manner set forth in the section of this decision entitled ''The Remedy.''

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at the training facility in Westville, New Jersey, copies of the attached notice marked ''Appendix B.'' [18] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by a representative of the Respondent RMHA, shall be posted immediately upon receipt and maintained by the Respondent Fund for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent RMHA has taken to comply.

C. The Respondent, Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO (Respondent Union), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Fund, the RMHA, or any other employer to discharge Michael Sullivan or any other employee employed by them for exercising their rights to engage in intraunion political activity.

(b) In any like or related manner interfering with, restraining, or coercing members in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Fund and the RMHA in writing, with a copy to Michael Sullivan, that the Respondent Union has no objection to the employment of Sullivan as apprentice instructor or training instructor at the Westville, New Jersey training facility, and simultaneously request the Fund and the RMHA to reinstate Sullivan to his former position as instructor.

(b) In conjunction with Respondent Fund and Respondent RMHA, with Respondent Union primarily liable, make Michael Sullivan whole for any loss of earnings he may have suffered by reason of his unlawful discharge, in the manner set forth in the section of this decision entitled ''The Remedy.''

(c) Post at its office and meeting halls frequented by its members copies of the attached notice marked ''Appendix C.''[19] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by a representative of Respondent Union, shall be posted immediately upon receipt and maintained by the Respondent Union for 60 consecutive days in conspicuous places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[18] See fn. 17.

[19] See fn.17.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accede to the demand of Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association, AFL–CIO (Respondent Union) to discharge Michael Sullivan or any other employee for exercising their rights to engage in intraunion political activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them in Section 7 of the Act.

WE WILL offer Michael Sullivan immediate and full reinstatement to his former position as apprentice instructor discharging, if necessary, any person hired to replace him and, WE WILL, in conjunction with Respondent Union, with the Respondent Union primarily liable, make Michael Sullivan whole for any loss of earnings or other benefits he may have lost as a result of his unlawful discharge.

ROOFERS LOCAL 30, JOINT APPRENTICESHIP
FUND OF PHILADELPHIA AND VICINITY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accede to the demand of Local 30, United Slate, Tile and Composition Roofers, Damp & Waterproof Workers Association (Respondent Union) to discharge Michael Sullivan or any other employee for exercising their rights to engage in intraunion political activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them in Section 7 of the Act.

WE WILL offer Michael Sullivan immediate and full reinstatement to his former position as training instructor without prejudice to his seniority or any other rights and privileges previously enjoyed, discharging, if necessary any person hired to replace him and WE WILL, in conjunction with Respondent Union, with Respondent Union primarily liable, make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge.

ROOFING, METAL & HEATING ASSOCIATES,
INC.

APPENDIX C

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Roofers Local 30, Joint Apprenticeship Fund of Philadelphia and Vicinity (Respondent Fund) or Roofing, Metal & Heating Associates, Inc. (Respondent RMHA) to discharge Michael Sullivan or any other employee employed by them for exercising their rights to engage in intraunion political activities protected under Section 7 of the Act.

WE WILL not object to Respondent Fund or Respondent RMHA reinstating Michael Sullivan to his former position as apprentice and/or training instructor.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them in Section 7 of the Act.

WE WILL notify Respondent Fund and Respondent RMHA, in writing, with a copy to Michael Sullivan, that we have no objection to the employment of Michael Sullivan as apprentice and/or training instructor in their respective schools, and WE WILL simultaneously request Respondent Fund and Respondent RMHA to reinstate Sullivan to his former position.

WE WILL, in conjunction with Respondent Fund and Respondent RMHA, with ourselves primarily liable, make Michael Sullivan whole for any loss of earnings and other benefits he may have lost as a result of our unlawful action against him.

LOCAL 30, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP & WATERPROOF WORKERS ASSOCIATION, AFL–CIO.